No. 88-1692

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Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED BUILDERS, INC.,
Petitioner,
v.
CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,
v.
TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,
v.
HARRY HOBBS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents seek to characterize these cases as presenting only the mundane task of construing a local workers-compensation law. But their characterization ignores that that local law is a District of Columbia law adopted pursuant to Article I, Section 8, Clause 17 of

the Constitution, that this Court has already definitively construed the precise language at issue from that law, that this Court has already rejected the D.C. Court of Appeals' construction of that very language, and that the D.C. Court of Appeals has in turn *rejected this Court's* construction of the language.

Respondents' characterization also ignores that in order to insist on *its* view of the statutory language at issue, the D.C. Court of Appeals has pronounced itself—not this Court—the "ultimate arbiter" of all D.C. laws. Respondents furthermore ignore that in order to justify its pronouncement the lower court has determined that *this Court erred* in failing to adhere to *that court's* prior construction and, moreover, that this Court has *no jurisdiction* to review a law (such as the present one) that is applicable only to the District of Columbia.

Even though the foregoing are the fundamental determinations that underlie the lower court's judgment in these cases, respondents' opposition to certiorari ("Opp.") largely avoids them. That opposition, instead, makes essentially two contentions: (1) that review of these cases is not warranted because, respondents say, the lower court committed no "egregious error" in its construction of the particular D.C. worker-compensation statute at issue; and (2) that the lower court's construction of that statute is not "final" within the meaning of 28 U.S.C. § 1257 and is for that reason not reviewable. Both contentions are wrong.

1. Respondents' contention that the D.C. Court of Appeals has not yet rendered a "final judgment" is based on a misstatement of the posture of these cases, a misapplication of the purposes of the "final judgment" rule, and a misreading of this Court's decisions construing that rule. Respondents characterize the D.C. Court of Appeals' judgment as "amount[ing] to the denial of motions to dismiss complaints for legal insufficiency under local law." Opp. 6-7. This is simply not so. Pe-

titioners' basic claim in these cases is that, under this Court's construction of the statutory provision at issue, they are wholly "immun[e] from employee tort suits" such as those presented here. *WMATA v. Johnson*, 467 U.S. 925, 931 (1984). This claim is completely unrelated to the merits of the employee tort suits, is not a mere defense to liability, and, contrary to respondents' characterization, has nothing to do with the "legal insufficiency" of the complaints. Rather, petitioners' claim is that they cannot be made to answer these suits at all, *regardless* of their legal sufficiency.

In such circumstances, this Court has often "held that state-court decisions rejecting a party's federal-law claim that he is not subject to suit before a particular tribunal are 'final' for purposes of [its] certiorari jurisdiction under 28 U.S.C. § 1257. *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963); *Construction Laborers v. Curry*, 371 U.S. 542 (1963)." *Mitchell v. Forsyth*, 472 U.S. 511, 525 n.8 (1985). There are two reasons that such a decision is final.

First, as *Mitchell* made clear, there is an important distinction between immunity from suit—"an entitlement not to stand trial or face the other burdens of litigation"—and a "mere defense to liability." The former "is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526. Second, as the *Mitchell* Court's citation to *Mercantile National Bank* illustrates, a claim that suit cannot be maintained *at all* against a party "is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action," and, furthermore, "it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257" to resolve such a claim "now . . . rather than subject [the parties] . . . to long and complex litigation which may all be for naught . . . ." *Mercantile National Bank*, 371 U.S. at 558. Because of the nature of petitioners' immunity claim—a claim that

would be lost if they were forced by the judgment below to proceed to trial—the judgment rejecting that claim is final under this Court's decisions in *Mitchell* and *Mercantile National Bank*.[1]

Moreover, it is clear that the policies of the final judgment rule are fully served by applying the *Mitchell* and *Mercantile National Bank* cases here. Those policies, as respondents themselves recognize, are "avoiding piecemeal litigation" and " 'minimizing federal intrusion in state affairs.' " Opp. 7, citing *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 159 (1973). Here, as *Mercantile National Bank* demonstrates, petitioners' immunity claim is anterior to and separate from the tort lawsuit itself; resolution of that independent claim is *final* in the courts below and refusal to entertain that claim now will mean that the asserted immunity *from trial* will be "effectively lost." *Mitchell*, 472 U.S. at 526. Furthermore, not only would review of this separate matter involve no "intrusion" on the lower court's authority to litigate the merits of any tort suit that may properly be brought,[2] but failing to permit review could erode significant federal policy interests.

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[1] Respondents purport to find our reliance on *Mitchell* and *Mercantile National Bank* "far afield" and "mystifying." Opp. 8-9. But that is only because (1) they refuse to acknowledge the difference between complete immunity from suit and a defense to liability, and (2) they (like the lower court) refuse to accept the proposition that a claim made under a law applicable only to the District of Columbia is a "federal" claim. *Whalen v. United States*, 445 U.S. 684, 687 (1980). See *infra* p. 7.

[2] It is debatable whether the "intrusion" factor is applicable here *at all*, given that the D.C. Court of Appeals does not have the authority of a State Supreme Court, and that this Court has plenary review authority over D.C. Court of Appeals decisions—including resolution of purely local matters. *Whalen v. United States*, 445 U.S. at 687-88.

The latter factor is overlooked entirely by respondents in their treatment of the "final judgment" point. Indeed, central to respondents' whole opposition is their insistence that no important policy interests are implicated by the judgment below; they say that our suggestions to the contrary are "breathtaking in [their] audacity—but wanting in good sense." Opp. 8. This flourish will not hide what is presented here. The judgment below turns on the proposition that the D.C. Court of Appeals is at liberty to reject any and all decisions of this Court—even definitive decisions construing the precise statutory language at issue—so long as a local D.C. law question is presented. To leave such a proposition unreviewed not only threatens to erode the authority of this Court over the lower court, but it casts confusion over the whole of District of Columbia law. Whose decisions govern that law—this Court's or the lower court's? Contrary to respondents' contentions, these matters *do* present important and recurring policy questions and, inasmuch as they have been finally determined by the lower court, they are now reviewable by this Court. *See Goodyear Atomic Corp. v. Miller*, 108 S. Ct. 1704, 1708-09 (1988).

Although respondents suggest that the mere fact that the D.C. Court of Appeals sent these cases back for trial makes its decision nonfinal, that is not the approach taken by this Court. Instead, the Court has consistently followed a "pragmatic," rather than a technical, approach in determining whether a judgment is "final" for purposes of 28 U.S.C. § 1257.[3] Under that approach, weighing the important considerations identified in *Mitchell*, *Mercantile National Bank*, and *Goodyear*, the judgment of the D.C. Court of Appeals is "final" and ripe for re-

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[3] *See, e.g., Goodyear Atomic Corp. v. Miller*, 108 S. Ct. at 1709; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477, 486 (1975); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. at 159-62.

view by this Court.[4] And, as further discussed below, it is important that the Court review that judgment.

2. Significantly, respondents concede—albeit indirectly—that important, unsettled questions are presented by these cases. For example, they acknowledge that *Key v. Doyle*, 434 U.S. 59 (1977), leaves "uncertain" whether D.C. laws such as that at issue—one passed by the D.C. Council and not overturned by Congress—are "statutes of . . . the United States" within this Court's certiorari jurisdiction under 28 U.S.C. § 1257(3) (now § 1257(a)). Opp. 10. Respondents also acknowledge that it would be "appropriate" for this Court "some day to resolve [that] uncertainty . . . ." Opp. 11. But they argue that these are not the cases in which to do so because, they assert, there is nothing intrinsically important about the *particular* D.C. Council-passed statute at issue, *i.e.*, a mere worker-compensation law. *Id.* This argument completely misses the point of these cases. The key point is that the D.C. Court of Appeals has expressly rejected this Court's construction of the language of a local D.C. law and has *premised* that rejection on its view that this Court has no jurisdiction to countermand it. It is difficult to imagine more compelling circumstances than these for this Court to decide whether it has certiorari jurisdiction to review D.C. Council laws.

Respondents apparently misunderstand this critical relationship between the certiorari jurisdiction issue and the lower court's defiance of this Court's decision in

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[4] Significantly, the cases which this Court reviewed in *WMATA v. Johnson* itself were in precisely the same posture as the present cases, *i.e.*, the court of appeals (the D.C. Circuit) denied immunity on the basis of the language here at issue and remanded the cases for trial. This Court granted certiorari and reversed, based on the plain meaning of that statutory language. It would surely not be "pragmatic"—in our view it would be perverse—if this Court had jurisdiction thus to establish the District's immunity rule, but had no jurisdiction to enforce that rule.

WMATA v. Johnson, 467 U.S. 925 (1984). For example, they expressly concede that "what may be the most debatable" proposition in Judge Mack's *Estep* dissent is the contention that "it is not at all clear that acts of Congress affecting only the District are 'laws of the United States' within the meaning of Article III." Opp. 15 (quoting Pet. App. 59a).[5] Respondents then say that this proposition "played no part in the court's decision in this case." *Id.* In fact, however, the stated jurisdictional proposition is *central* to the decision in these cases.

The key underpinning of the judgment below—which is *expressly stated* in Judge Mack's opinion in these cases—is that "[o]n a question of purely local law, this court is undeniably the final arbiter." Pet. App. 6a. Plainly, it was only because the court below held itself the "final arbiter" of the statutory language at issue that it could reaffirm its own announced view of that language in *DiNicola*,[6] even though this Court rejected that view in *Johnson*;[7] and just as plainly, the *only*

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[5] It is charitable for respondents to call this proposition "debatable." In fact, the proposition is flatly contradicted by this Court's square holding in *Whalen v. United States*, 445 U.S. at 684: "Acts of Congress affecting only the District, like other federal laws, certainly come within this Court's Article III jurisdiction, and thus we are not prevented from reviewing the decisions of the District of Columbia Court of Appeals interpreting those Acts in the same jurisdictional sense that we are barred from reviewing a state court's interpretation of a state statute." *Id.* at 687-88.

Significantly, while respondents nowhere even address *Whalen* in their opposition, they appear to agree with us (Pet. 15-16) that for jurisdictional purposes statutes passed by the D.C. Council and approved by Congress should be treated the same as Acts of Congress made applicable only to the District. *See* Opp. 10 ("The council acts by delegation from Congress, true enough").

[6] *DiNicola v. George Hyman Constr. Co.*, 407 A.2d 670 (D.C. 1979).

[7] As the court below said in these cases, "[s]ignificantly, the reasoning underlying *Johnson* [was] rejected by our own court in

reason the lower court could logically declare itself the "final arbiter" of the language was its determination that this Court has *no jurisdiction* to review that language. How else would the lower court be the *final* arbiter?

Respondents are therefore wrong to claim that the "only possible question" presented for this Court's review (other than jurisdiction) is "whether the District of Columbia Court of Appeals was egregiously wrong in interpreting the Council's workers compensation statute as it did." Opp. 6. Respondents are also wrong to claim that this question "is not a debatable" one. *Id.* at 13. The former claim simply ignores the important questions presented; the latter claim assumes the answers to those questions.

If this Court *does* have jurisdiction to review the lower court's interpretation of the statute, and if that court was therefore wrong to determine that it is necessarily the "final arbiter" of the statute's language, and if the lower court was bound by this Court's previous determination that that language is "plain" and "clear" on its face,[8] then the lower court did indeed err "egregiously" in presuming to defy this Court. But the stated important questions must be resolved before one can know whether such error occurred;[9] and only because

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DiNicola . . . ." Pet. App. 6a. The important question raised here is whether the court should have viewed the matter the other way around.

[8] *WMATA v. Johnson*, 467 U.S. at 936, 938.

[9] Although respondents simply assume that this Court would judge the lower court's decision by the "egregious error" standard, this is almost certainly incorrect. That standard is appropriate *only* as to questions "of *exclusively* local concern." *Whalen*, 445 U.S. at 687 (emphasis supplied). Clearly, the important questions presented in the petition are not of such character. Moreover, as we showed in our petition (Pet. 19-20)—a showing respondents ignore—this Court has already determined that the interpretation

respondents have ignored those important questions can they label their own, narrower question "not debatable."

Rather than address the important questions head on, respondents choose instead to belittle our concern over the lower court's failure to follow *Johnson*; they say that failure is, at worst, a form of *lèse majesté*. Opp. 13. Respondents even attempt to belittle *Johnson* itself by saying that the *Johnson* majority "*claimed* faithfulness 'to the plain language of the statute,'" and that while "[t]he six justices of the [*Johnson*] majority . . . may wish their opinion had been found more persuasive by the court of appeals[,] [t]hat is not the issue." Opp. 2, 13 (emphasis supplied). We of course agree that that is not the issue. The real issue is whether *WMATA v. Johnson*—an authoritative decision of the United States Supreme Court, not merely of six Justices—was improperly rejected by the lower court in these cases. Respondents' gratuitous efforts to trivialize that issue cannot serve to answer it, nor undermine its importance.

Contrary to respondents' contentions, this case at bottom is not about a local workers' compensation law at all. It is about the relationship between this Court and the District's highest local court,[10] about the supervisory role

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of a local D.C. law which incorporates federal statutory language is *not* an exclusively local matter. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). It was presumably for this very reason that the Court had no occasion in *Johnson* itself even to consider the possibility of deferring to *DiNicola*.

[10] While respondents repeatedly imply that the D.C. Court of Appeals should be treated as if it were identical to a State Supreme Court, it in fact is *not* to be so treated, as *Whalen* makes clear. *See* n.2, *supra*. Indeed, as this Court has stated, the nature and role of the District of Columbia "in our governmental structure" is "*sui generis*." *District of Columbia v. Carter*, 409 U.S. 418, 432 (1973).

Congress intended this Court to have over that court,[11] and, ultimately, about the integrity of this Court's own decisions. These are weighty matters.[12] They have raised important questions in these cases. Those questions merit this Court's attention now, not "some day." Opp. 11. The petition should be granted.

CONCLUSION

For the foregoing reasons, and those stated in our petition and the various briefs *amici curiae*, the writ of certiorari should be issued.

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[11] Congress also intended that the D.C. Council and the Congress make the laws for the District, not the D.C. Court of Appeals. Yet nowhere do respondents even address our contention (Pet. 25-29) that the judgment below effectively "amends" a statute that neither the Council nor the Congress has chosen to amend. Neither do respondents address our showing (Pet. 2 n.16) that the lower court's resort to presumptions about the D.C. Council's supposed knowledge of *DiNicola* was wholly inappropriate where, as here, the statutory language the D.C. Council used (and Congress approved) has been held by this Court to be "plain" on its face. *Johnson*, 467 U.S. at 938.

[12] We by no means suggest that the substantive immunity issue presented by D.C.'s worker-compensation law is itself unimportant. Respondents themselves concede that the issue is a "persistent" one (Opp. 2) and, of course, this Court considered the issue sufficiently important to grant certiorari in *Johnson*. Moreover, as the *amici* briefs filed in these cases show, that issue remains of considerable importance to many parties, including Maryland, Virginia, WMATA, and the Association of Minority Contractors. Nevertheless, as those *amici* argue and as our petition shows, an even more important issue is now raised by the present cases—whether this Court's previous resolution of that substantive issue may be rejected by the lower court.

Respectfully submitted,

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